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IN THE COURT OF APPEALS OF INDIANA

ROBERT AND BARBARA WILLIAMS,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 20A05-0609-CV-525
	)	
KEYSTONE RV,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0409-CT-527

May 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-plaintiffs Robert and Barbara Williams (the Williamses) appeal the trial

court's grant of summary judgment in favor of appellee-defendant Keystone RV (Keystone) on the Williamses' breach of warranty claims following their purchase of a recreational vehicle (RV) from Keystone. Specifically, the Williamses contend that the trial court erred in denying their motion to strike several affidavits that Keystone had submitted in support of its motion for summary judgment. Additionally, the Williamses argue that the trial court erred in concluding that Keystone was entitled to judgment as a matter of law on the breach of express and implied warranty claims. Finding no error, we affirm the judgment of the trial court.

FACTS

Keystone is an RV manufacturer in Goshen. The Williamses have a mailing address in Ponca City, Oklahoma, but they reside in various locations.

On June 3, 2002, Robert placed an order for a 2003 Montana RV, which Keystone had manufactured, from Key RV (Key) in North Dakota. The purchase order contained a disclaimer of warranty provision. On July 23, 2002, the Williamses took possession of the RV from Key. At that time, the Williamses signed a retail warranty registration form, which provided for a limited one-year warranty from Keystone. The warranty was to expire on July 22, 2003. Under the terms of the warranty, the Williamses were required to provide written notice to Keystone of any defects no later than ten days after the expiration of the warranty period. The Williamses were also responsible for normal maintenance and minor adjustments to the RV after the first ninety days of warranty coverage.

The express warranty excluded components of the RV that were covered by a separate

manufacturer's warranty, and damages that arose from normal deterioration due to wear or exposure. The brakes and axles of the Williamses' RV were covered by a separate limited warranty provided by the parts' manufacturer, Al-Ko Kober Corporation (Al-Ko).

Throughout the Keystone limited one-year warranty period, Keystone paid all legitimate and timely submitted warranty claims relating to the RV. However, sometime in September 2003, the Williamses brought the RV to Tarpley RV (Tarpley) in Durango, Colorado, complaining about several items, including the brakes. Because the brakes were covered by Al-Ko's warranty, Tarpley dealt directly with Al-Ko in obtaining new parts for the RV, including a new axle and braking system. Keystone reimbursed Tarpley for the brake-related problems and for work performed on other items even though the warranty had expired several months earlier.

On March 31, 2004, the Williamses brought the RV to Adventure RV and Truck Center, LLC (Adventure), in Wichita, Kansas. At that time, Robert complained that the brakes were not working properly. After being contacted by Adventure, Keystone approved three additional hours of warranty work on the brakes to allow Adventure's technicians to determine whether the brakes were actually malfunctioning. The inspection revealed that the RV's brakes were working properly.

On July 23, 2004, the Williamses filed a complaint against Keystone, alleging that the prior repairs to the RV had been unsuccessful and that they continued to experience problems with the braking system. The Williamses contended that because of Keystone's refusal to perform warranty work and "the resulting safety problems," they were entitled to a judgment

against Keystone "in the sum in excess of $50,000, pre-judgment interest, post-judgment interest, attorney's fees and all other just and proper relief." Appellants' App. p. 1-2.

Thereafter, on November 16, 2005, Keystone filed a motion for summary judgment with regard to the Williamses' tort and breach of express and implied warranty claims. Keystone claimed that it was entitled to judgment as a matter of law on the breach of warranty claims because the RV's brakes were repaired and the one-year period of the limited warranty expired on June 22, 2003. Moreover, Keystone asserted that it did not warrant any part covered by another manufacturer's warranty, and the allegedly defective braking system was covered by a warranty from Al-Ko. Keystone also pointed out that Robert had disclaimed all implied warranties when he signed the purchase order and that because the Williamses' claims against Keystone were based solely on the theory of breach of warranty, they could not recover damages in tort as a matter of law.

In support of its motion for summary judgment, Keystone submitted the affidavit of Rick Deisler, an employee of Keystone. Deisler's affidavit stated that he was familiar with the warranties offered on Keystone products and the specific service that had been performed on the Williamses' RV. Deisler attested that "based on the one year limited warranty period's expiration and the Adventure repair technicians' findings that the RV's brakes operated properly, Keystone has not authorized any further repair work on the RV." Appellee's App. p. 29.

Keystone also presented the affidavit of Daniel Sutton, the Service Manager at Tarpley. Sutton stated that Tarpley had replaced the brakes and axles on the RV and the

"braking system was restored to good working order" in September 2003. Id. at 31. Finally, Keystone submitted the affidavit of Kris Lessley, the service writer for Adventure. Lessley stated that he and William McLean, one of Adventure's technicians, had met with Robert on March 31, 2004, regarding the alleged brake problems. Lessley described the testing procedures in the affidavit and attested that the brakes on the Williamses' RV were operating normally. Lessley also stated that "Robert . . . observed the tests . . . and I communicated to [Robert] that the brakes were in good working order at the conclusion of the tests." Id. at 34. Finally, Lessley concluded that if he "felt it was unsafe for the Williams to pull the RV . . . [he] would have made a notation on the report." Id.

Although the Williamses did not respond to Keystone's motion for summary judgment, they filed a motion to strike the affidavits of Deisler, Sutton, and Lessley on April 21, 2006. The Williamses claimed that Deisler's affidavit was hearsay because no foundation had been laid for the admission of Keystone's records. Moreover, the Williamses asserted that the Lessley affidavit should be stricken because the Adventure repair technician's findings were hearsay. The Williamses further claimed that Sutton's affidavit should be stricken because there was no showing that his conclusion that the braking system on the RV "was restored to good working order" was being "offered as a lay opinion made by somebody with personal knowledge." Appellants' App. p. 7. Moreover, the Williamses contended that if the affidavit was being offered as a conclusion or an opinion of an expert, "there is no showing that . . . Sutton has the expertise to render such an opinion." Id. at 7-8. The Williamses asserted that the affidavit did not show that Sutton had personal knowledge

that Robert brought the RV in for repairs or that the repairs were in fact made.

Finally, the Williamses moved to strike Lessley's affidavit because there was "no showing that either he or McLean qualified as an expert" as required by Indiana Evidence Rule 702. Id. Moreover, the Williamses contended that the affidavit failed to "show personal knowledge that the brake was not incorrectly assembled, or built differently." Id. at 9.

In response, Keystone filed supplemental affidavits of Deisler, Sutton, and Lessley. Deisler's supplemental affidavit stated that he had personally reviewed Keystone's warranty repair records that were kept in the normal course of Keystone's business and that he had personal knowledge that Keystone had paid all legitimate and timely submitted warranty claims on behalf of the Williamses. Furthermore, Deisler stated that based upon the records, Keystone authorized Adventure to perform up to three hours of additional warranty work and tests on the RV's brakes.

Sutton's supplemental affidavit indicated that he was "personally aware" that the Williamses brought in the RV for repairs at Tarpley in September 2003. Appellee's App. p. 63. Sutton also stated that he was personally involved in the repair work, that the brakes and axles were restored to good working order, and that he held a technical certification from the Recreational Vehicle Industry Association and the National RV Dealers Association.

Lessley's supplemental affidavit indicated that he was present when McLean examined and tested the brakes on the RV. Lessley also described the testing that he and McLean conducted in concluding that the brakes had been correctly installed and were

working properly.

On July 20, 2006, the trial court conducted a hearing on the Williamses' motion to strike and Keystone's motion for summary judgment. The motion to strike was denied, and the trial court granted Keystone's motion for summary judgment. In its order of August 25, 2006, the trial court found as follows:

> 3. At the time he signed the purchase order, Mr. Williams disclaimed all implied warranties by signing a valid disclaimer of implied warranties.
>
> 4. The Williams[es] picked up the RV on July 23, 2002. Keystone's Express Warranty began to run on that date and was limited to one year. The Express Warranty excluded equipment covered by the equipment manufacturer's own warranty.
>
> 5. The brakes and axle of the RV were covered by a separate two year warranty provided by the manufacturer of the brakes and axle, Al-Ko Kober Corporation, and were not covered by Keystone's Express Warranty.
>
> 6. Throughout Keystone's limited one-year Express Warranty period, Keystone paid all legitimate and timely submitted warranty claims pertaining to the RV.
>
> 7. After Keystone's Express Warranty had expired, the Williams[es] brought the RV to Tarpley RV. At this repair facility, the RV's brakes and axles were completely replaced pursuant to Al-Ko Kober Corporation's warranty, and the brakes were restored to good working order.
>
> 8. On approximately March 31, 2004, the Williams[es] brought the trailer to Adventure . . . complaining of brake problems. An inspection by Adventure found the brakes to be working properly and that pulling the RV was safe.
>
> 9. Keystone did not breach its Express Warranty, because the warranty had expired months before the RV was taken to Tarpley and Adventure, and Keystone had paid all legitimate and timely submitted warranty claims

under the terms of the Express Warranty. Furthermore, Keystone's Express Warranty never applied to the brakes and axles of the RV, which were warranted by Al-Ko Kober Corporation.

10. The Williams[es] disclaimed all implied warranties. Therefore, Keystone is not liable to the Williams[es] for breach of any implied warranty. And even if implied warranties applied, there was no breach here, because the designated evidence establishes that, following the replacement of the brakes, they were working properly.

11. Finally, with regard to the tort-based damages the Williams[es] allege in their Complaint, the Williams[es'] counsel conceded, at the hearing, that summary judgment is appropriate on this claim.

12. Summary judgment as to all Plaintiffs' claims should be, and is, hereby GRANTED.

Id. at 10-12. The Williamses now appeal.

DISCUSSION AND DECISION

I. Motion to Strike

The Williamses first argue that the trial court erred in denying their motion to strike the affidavits of Deisler, Sutton, and Lessley from Keystone's designated evidence. Specifically, the Williamses contend that the affidavits fail to set forth the necessary qualifications of the witnesses and "all offer opinion evidence outside of the common knowledge of ordinary people." Appellants' Br. p. 9.

In general, we note that affidavits in support of a motion for summary judgment must present admissible evidence that should follow substantially the same form as though the affiant were giving testimony in court in order to comply with the requirements of Trial Rule 56(E). Comfax Corp. v. N. Am. Van Lines, Inc., 638 N.E.2d 476, 481 (Ind. Ct. App. 1994). To overturn the denial of a motion to strike, a trial court must have committed an abuse of

discretion. McCutchan v. Blanck, 846 N.E.2d 256, 260 (Ind. Ct. App. 2006).

Although the Williamses contend that the affidavits should have been stricken because there was no showing that Deisler, Sutton, and Lessley qualified as expert witnesses under Indiana Evidence Rule 702,[1] qualification under Rule 702 is only required if the witness's opinion is based on scientific, technical or other specialized knowledge. On the other hand, the testimony of an observer possessing knowledge beyond that of the average juror may be nothing more than a report of what the witness observed, and therefore is admissible as lay testimony. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). This type of evidence is not governed by Rule 702 because "scientific principles" are not involved. Jervis v. State, 679 N.E.2d 875, 881 (Ind. 1997).

Deisler's affidavits present the undisputed evidence that Keystone paid for all legitimate warranty claims on behalf of the Williamses. Appellee's App. p. 28, 61. Moreover, the affidavits confirm the terms of the Keystone express warranty that applied to the Williamses' RV. Id. at 30. Deisler stated that his conclusions were based on personal knowledge, and the Williamses have made no showing that Deisler was required to be qualified as an expert witness under Evidence Rule 702. Thus, we conclude that the trial

[1] Evid. R. 702 states:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

court did not err in refusing to strike Deisler's affidavits.

Sutton's affidavits establish that he was the service manager of the repair facility that replaced the brakes and axles in accordance with Al-Ko's warranty. Id. at 31, 63. Sutton attested that he was personally involved in the repairs of the RV and that the brakes and axles of the RV were replaced and restored to good working order. Id. at 31, 63. Moreover, Sutton attested that he holds two technician certifications. Id. at 63. In essence, the affidavits established that Sutton was a skilled witness as to the functioning of the RV's brakes and that he had personal knowledge of the brake and axle replacements as shown by his specialized knowledge as a technician in the heavy truck and recreational vehicle fields. Thus, we conclude that the trial court did not err in denying the Williamses' motion to strike Sutton's affidavit.

Lessley's affidavits provided evidence regarding the operation of the RV's brakes. Id. at 33-34, 79. Lessley stated that he personally participated in the testing of the brakes and that the brakes satisfactorily brought the RV to a stop. Lessley also told Robert that the brakes were in good working order and that he had no safety concerns regarding the brakes. Id. at 34. In light of this evidence, we find that the trial court did not err in refusing to strike Lessley's affidavits.

In sum, the trial court properly denied the Williamses' motion to strike the affidavits that Keystone submitted in support of its motion for summary judgment. The affidavits were appropriately before the trial court and were properly considered in deciding whether to grant Keystone's motion for summary judgment.

II. Summary Judgment

The Williamses claim that the trial court erred in granting Keystone's motion for summary judgment on their breach of warranty claims. The Williamses contend that North Dakota law controls the outcome of this case and that the designated evidence showed that genuine issues of material fact exist with regard to the warranty claims. Thus, the Williamses maintain that the matter should proceed to trial.

When reviewing the trial court's grant of summary judgment, we apply the same standard the trial court applied. Summary judgment is appropriate if the pleadings and evidence submitted demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Wilson v. Royal Motor Sales, Inc., 812 N.E.2d 133, 135 (Ind. Ct. App. 2004). Because a trial court's grant of summary judgment comes to us clothed with a presumption of validity, the appellant must persuade us that error occurred. Id. Nevertheless, we carefully scrutinize motions for summary judgment to ensure that the non-moving party was not improperly denied his or her day in court. Id.

Finally, we note that the trial court entered specific findings of fact and conclusions of law in its order granting summary judgment for Keystone. Although such findings and conclusions are not required, and while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court's reasons

for granting or denying summary judgment. Bernstein v. Glavin, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000). If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Irwin Mortgage Corp. v. Marion County Treasurer, 816 N.E.2d 439, 442 (Ind. Ct. App. 2004).

The Williamses contend for the first time on appeal that North Dakota law precludes the entry of summary judgment for Keystone. The Williamses could have raised a choice of law argument in the trial court, but they neither responded in writing to Keystone's motion for summary judgment nor advanced such an argument at the summary judgment hearing. As a result, the issue is waived. See Stainbrook v. Low, 842 N.E.2d 386, 396 (Ind. Ct. App. 2006), trans. denied (holding that a party may not change its theory on appeal and argue an issue that was not properly presented to the trial court).[2]

In addressing the remainder of Williamses' claims, we first note that Indiana Trial Rule 56(H) provides that "no judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court." While the Williamses direct us to their complaint, they are not permitted to rely upon the mere allegations set forth in unverified pleadings to defeat summary judgment. Indeed, the response to a motion for summary judgment—by affidavit or otherwise—must set forth specific facts showing that there is a genuine issue for trial. Myers v. Irving Materials, Inc.,

[2] Even if the Williamses had not waived the issue, North Dakota law provides that implied warranties may be disclaimed. NDCC § 41-02-33. North Dakota has also recognized that an agreement between the parties to a sale of personal property that expressly negates the existence of implied warranties is not contrary to public policy. Knecht v. Universal Motor Co., 113 N.W.2d 688 (N.D. 1962).

780 N.E.2d 1226, 1228 (Ind. Ct. App. 2003).

That said, the Williamses claim—for the first time on appeal—that two letters included in Robert's deposition created a genuine issue of material fact regarding unresolved problems with the RV. However, the Williamses failed to designate these letters, which are a portion of Exhibit C, to the trial court. In the motion for summary judgment, Keystone designated another portion of Exhibit C—the RV purchase order and the Al-Ko limited warranty—but did not designate the letters. The Williamses may not argue that non-designated portions of the exhibit create a genuine issue of material fact. T.R. 56(H).

Nonetheless, we note that to prevail on a breach of warranty claim, the claimant must establish: 1) that a warranty existed; 2) that the warranty was breached; 3) causation; and 4) resulting damages. Peltz Constr. Co. v. Dunham, 436 N.E.2d 892, 894 (Ind. Ct. App. 1982).

In this case, the designated evidence establishes that the Williamses' legitimate and timely submitted warranty claims were paid by Keystone. Appellee's App. p. 28. In addition to the repairs that were made during the period of Keystone's express warranty, Keystone paid for additional repairs to the RV in the fall of 2003—several months after the warranty had expired. Id. at 31. At the same time, the replacement of the RV's brakes and axles were completely paid for by Al-Ko, the company that had warranted the brakes and axles. Id. When the Williamses again complained about the brakes, Keystone authorized and paid for Adventure to determine whether there was a problem with the RV's brakes—equipment warranted by Al-Ko rather than Keystone—nearly eight months after Keystone's express warranty had expired. Id. at 33. Adventure tested the brakes and determined that they

worked properly. Id. at 33-34, 65, 67-69.

Keystone specifically disclaimed any warranty on the RV equipment that was covered by an express warranty from the equipment's manufacturer. Id. at 30. Indeed, Al-Ko provided the warranty covering the RV's brakes. The Williamses were aware of the warranty, and they contacted Al-Ko representatives regarding the brake problems. The designated evidence also showed that Al-Ko eventually paid to replace the brakes and the axle parts covered by the warranty. Id. at 31.

In sum, Keystone cannot be held liable on a breach of express warranty theory as a matter of law for any defect in the brakes and axles because Keystone specifically excluded that equipment from its express warranty coverage. Put another way, the Williamses have not designated any evidence to show that genuine issues of material facts exist regarding whether Keystone performed according to the terms of the express warranty.

With respect to the Williamses' claim that Keystone breached an implied warranty, the designated evidence established that Keystone expressly disclaimed all implied warranties in the purchase order that Robert signed. The language of the disclaimer specifically referenced the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Id. at 45. Robert signed and dated the exclusion separately from the purchase order's remaining provisions, which made him aware of the disclaimer provisions. As a result, we cannot say that the trial court erred in granting Keystone's motion for summary judgment on the Williamses' implied warranty claims.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.